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INTERNATIONAL FLAVORS & FRAGRANCES INC.
521 WEST 57TH ST
NEW YORK, NY 10019

EXAMINER	
ROGERS, JAMES WILLIAM	
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The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LEWIS MICHAEL POPPLEWELL,
CORY MICHAEL BRYANT, and LULU S. HENSON

Appeal 2009-007492
Application 10/693,527
Technology Center 1600

Decided: December 9, 2009

Before TONI R. SCHEINER, MELANIE L. MCCOLLUM, and
STEPHEN WALSH, *Administrative Patent Judges*.

WALSH, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134(a) involving claims to a liquid flavor or fragrance system. The Patent Examiner rejected the claims for obviousness. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

STATEMENT OF THE CASE

"The invention relates to compositions containing organically compatible cellulosic materials, specifically, ethyl cellulose and hydroxypropyl cellulose that are capable of forming substantially continuous solutions with flavors and fragrances" (Spec. 1). Claims 26, 27 and 29-34, which are all the pending claims, are on appeal.

Claim 26 is representative and reads as follows:

> 26. A continuous liquid flavor or fragrance system comprising from about 80 to about 99.5 weight percent a flavor or fragrance material and from about 0.5 to about 20 weight percent a cellulose polymer, wherein the cellulose polymer is selected from the group consisting of hydroxypropyl cellulose and ethyl cellulose, with the proviso that the continuous liquid flavor or fragrance system is not a liquid crystalline.

The Examiner rejected claims 26, 27 and 29-34 under 35 U.S.C. § 103(a) as unpatentable over Bergemann.[1] Claims 27 and 29-34 have not been argued separately and therefore stand or fall with claim 26. 37 C.F.R. § 41.37(c)(1)(vii).

OBVIOUSNESS

The Issue

The Examiner's position is that Bergemann taught a homogenous liquid composition "comprised of A) 10-90% lactate ester, B) 10-90% of an edible oil ester (including corn, mustard, olive, peanut, poppy and the like, thus meeting flavor or fragrance material), C) 0-25%, or more preferably 4-7% surfactant and D) 0-10%, or more preferably 4-7% thickener including

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[1] U.S. Patent No. 6,096,699, issued to Eugene P. Bergemann et al., Aug. 1, 2000.

hydroxypropyl cellulose." (Fin. Rej. 3.) Because the weight percent of Appellants' flavor or fragrance material overlaps the weight percent of Bergemann's edible oil ester, the Examiner concluded that the claimed composition would have been obvious. (*Id.*)

Appellants contend that "the claimed invention requires the cellulose polymer be soluble in organic solvents," but "Bergemann would not lead one skilled in the art to essentially include a cellulose polymer in the composition, let alone to recognize the criticality of the types of cellulose polymers to be included." (App. Br. 5.) Appellants claim to "have shown the particular cellulose polymers . . . are critical, and achieve unexpected results relative to the prior art disclosure in its entirety." (*Id.* at 5-6, citing *Woodruff*.)

The issues with respect to this rejection are:

1. Have Appellants established that Bergemann would not have led one of ordinary skill in the art to use a cellulose polymer that was soluble in organic solvents?
2. Have Appellants disclosed critical or unexpected results?

Findings of Fact

We adopt the Examiner's findings of fact.

Principles of Law

"The law is replete with cases in which the difference between the claimed invention and the prior art is some range or other variable within the claims. . . . These cases have consistently held that in such a situation, the [A]pplicant must show that the particular range is *critical*, generally by

showing that the claimed range achieves unexpected results relative to the prior art range." *In re Woodruff*, 919 F.2d 1575, 1578 (Fed. Cir. 1990) (emphasis in original).

Analysis

We agree with the Examiner that Bergemann explicitly taught using hydroxypropyl cellulose as a thickener in working examples. (Ans. 4.) We also agree with the Examiner that Bergemann's additional disclosure of alternative thickeners was not a teaching away from using hydroxypropyl cellulose. (*Id.* at 4-5, citing *In re Fulton.*)

Like the Examiner, we find that Appellants did not establish criticality or an unexpected result associated with using hydroxypropyl cellulose as a thickener. (Ans. 5.) Although Appellants argue the organic solubility of the claimed cellulose polymer as critical, that property was known in the prior art. *See, e.g.*, Bergemann at col. 4, ll. 6-7: "A contemplated composition is substantially free of added water."

CONCLUSIONS OF LAW

Appellants have not established that Bergemann would not have led one of ordinary skill in the art to use a cellulose polymer that was soluble in organic solvents; and

Appellants have not disclosed critical or unexpected results associated with using Bergemann's hydroxypropyl cellulose thickener.

SUMMARY

We affirm the rejection of claims 26, 27 and 29-34 under 35 U.S.C. § 103(a) as unpatentable over Bergemann.

TIME PERIOD

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

alw

INTERNATIONAL FLAVORS & FRAGRANCES INC.
521 WEST 57TH ST
NEW YORK, NY 10019